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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

15 | In re: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

Master File No. 3:07-md-05944-
SC (N.D. Cal.)

17 This Document Relates to: Individual Case
No. 13-cv-2171 (SC)

MDL No. 1917

DELL INC. AND DELL PRODUCTS L.P.,

**DELL'S OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT
WITH RESPECT TO DELL'S
FOREIGN PURCHASES
UNDER THE FTAIA [MDL
DKT. NO. 3003]**

19 | Page

30 | P a g e

V.

HITACHI LTD. ET AL

22 | DEFENDANT

23

Date: February 6, 2015

Time: 10:00 a.m.

Courtroom: 1

Judge: Honorable Samuel Conti

[REDACTED]

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ISSUE PRESENTED

2 Whether there is a genuine issue of material fact that Dell's foreign purchases of
3 CRT monitors, at prices that were contractually negotiated with Dell in the United States,
4 are recoverable under the FTAIA's domestic effects exception regardless of whether those
5 CRT monitors were imported into the United States.

INTRODUCTION

7 Defendants argue that they should be allowed to keep almost \$150 million in
8 overcharges paid by four of Dell's foreign affiliates¹ in connection with CRTs that were
9 not subsequently imported into the United States. *See generally In re CRT Antitrust Litig.*
10 (*In re CRT*), No. 3:07-cv-05944, Dkt. No. 3003 at 1 (the "Dell FTAIA Motion" or
11 "Motion").² Contrary to Defendants' argument, however, the FTAIA does not preclude
12 foreign plaintiffs from bringing Sherman Act claims in federal court, nor does it require
13 that price-fixed goods be shipped to the United States to be actionable. *See H.R. Rep. No.*
14 97-686, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 (explaining that the
15 FTAIA's "domestic effects" requirement "does not exclude all persons injured abroad
16 from recovering under the antitrust laws of the United States").

Rather, the FTAIA's domestic effects exception makes clear that a foreign plaintiff can bring a Sherman Act claim in the United States based on foreign anticompetitive

²¹ Dell's foreign affiliates, Asia Pacific (Malaysia) Sdn, Dell (China) Company Ltd., Dell
²² Products (Europe) BV, and Dell Computadores do Brazil, Ltda ("Dell's Foreign
²³ Affiliates"), bought CRT monitors from Defendants and their affiliates at prices that were
²⁴ negotiated by Dell and its suppliers in the United States, and that were binding on Dell's
²⁵ Foreign Affiliates. Dell's Foreign Affiliates have assigned their claims to Dell. See Declaration of Debra D. Bernstein filed herewith, Ex. 1 (Composite Exhibit of Dell's Foreign Affiliates' assignment of claims to Dell Inc.). Unless otherwise noted, all Exhibits cited in the Brief are to the Bernstein Declaration.

26 ² Defendants' Motion is directed to a subset of Dell's purchases. Defendants' Motion does
27 not challenge Dell's purchases involving monitors that were imported into the United
28 States. Rather, Defendants' Motion involves a subset of "allegedly price-fixed CRTs
 incorporated into monitors that were manufactured in overseas factories, and purchased by
 the Dell Foreign Affiliates, but never shipped to the United States." Motion at 3.

1 conduct, even if it did *not* involve import trade or commerce,³ as long as it (1) had a
 2 “direct, substantial, and reasonably foreseeable effect” on American domestic or import
 3 commerce, and (2) that effect gave rise to the plaintiff’s Sherman Act claim. Foreign
 4 Trade Antitrust Improvements Act (“FTAIA”), 15 U.S.C. § 6a; *F. Hoffmann-La Roche*
 5 *Ltd. v. Empagran S.A.*, 542 U.S. 155, 161–62 (2004); *In re Dynamic Random Access*
 6 *Memory (DRAM) Antitrust Litig. (In re DRAM)*, 546 F.3d 981, 985–86 (9th Cir. 2008).

7 The evidence in this case is more than sufficient to satisfy both prongs of the
 8 FTAIA’s domestic effects test. Dell is seeking to recover overcharge damages in
 9 connection with CRT product purchases it made at prices that were negotiated between
 10 Dell and the Defendants or their affiliates in the United States, and those same prices were
 11 binding on Dell’s Foreign Affiliates pursuant to Master Purchase Agreements (MPAs).
 12 Those purchases have a clear connection to the United States. In the LCD antitrust
 13 litigation, Judge Illston addressed virtually identical facts and held “that [Dell’s] MPAs
 14 and subsequent price negotiations were a domestic effect of defendants’ anticompetitive
 15 conspiracy that proximately caused Dell’s foreign injury” under the FTAIA. See *In re*
 16 *TFT-LCD (Flat Panel) Antitrust Litig. (In re LCD (Dell))*, 781 F. Supp. 2d 955, 964 (N.D.
 17 Cal. 2011). The same is true here.

18 **I. Prong 1: Defendants’ Conduct Had a “Direct, Substantial, and Reasonably
 19 Foreseeable Effect” on United States Commerce and Dell**

20 With respect to Prong 1, there is overwhelming evidence that Defendants’ conduct
 21 had a direct, substantial, and reasonably foreseeable effect on the United States market.
 22 For example, Defendant Samsung SDI Company (“SDI”) has admitted that it conspired
 23 with other major CRT producers in the United States and that the conspirators’ unlawful
 24 conduct substantially affected interstate commerce. Ex. 3, Amended Plea Agreement at
 25 ¶4(d), *United States v. Samsung SDI Company, Ltd.*, No. 11-cr-0162 (N.D. Cal. May 17,
 26 2011) (“SDI Guilty Plea”) (“The business activities of the defendant and its co-

27 _____
 28 ³ The FTAIA does not even apply to “import commerce,” much less restrict a plaintiff’s
 ability to recover damages in connection with “import commerce.”

1 conspirators in connection with the production and sale of CDTs that were the subject of
 2 this conspiracy were within the flow of, and substantially affected, interstate and foreign
 3 trade and commerce. During the relevant period, [SDI's] CDT sales, directly affected by
 4 the conspiracy, to customers in the United States totaled approximately \$89 million.”).
 5 “Even though much of the alleged conspiracy-related activity occurred abroad . . . the end
 6 target and end result was the United States.” *In re CRT*, Dkt. No. 2437 at 18; *see also id.*,
 7 Dkt. No. 2611 at 20 (same).

8 Defendants’ conduct also had a direct, substantial, and reasonably foreseeable
 9 domestic effect on Dell. During most of the relevant period, Dell’s Worldwide
 10 Procurement Team was based in Round Rock, Texas, and that team negotiated with
 11 Defendants (or CRT product suppliers who owned or controlled Defendants) to set a single
 12 worldwide price for CRT monitors purchased by Dell. In the comparable LCD antitrust
 13 litigation, Judge Illston found that Prong 1 was met based on Dell’s allegations that “an
 14 important domestic effect of the conspiracy was the setting of a global price for all TFT-
 15 LCD Products purchased from defendants, which was negotiated at Dell’s Texas
 16 headquarters.” *See In re LCD (Dell)*, 781 F. Supp. 2d at 962.

17 **II. Prong 2: The Domestic Effects of Defendants’ Conduct Gave Rise to Dell’s 18 Foreign Affiliates’ Injuries**

19 Prong 2 is also met because the domestic effect of Defendants’ conduct (higher
 20 prices set to Dell in the United States) is precisely what gives rise to Dell’s antitrust claim.
 21 Under the express terms of Dell’s MPAs, that U.S.-negotiated price was a “worldwide”
 22 price that was binding on Dell and its Foreign Affiliates. Judge Illston considered almost
 23 identical factual allegations, and held that such facts were sufficient to establish “that the
 24 MPAs and subsequent price negotiations were a domestic effect of defendants’
 25 anticompetitive conspiracy that proximately caused Dell’s foreign injury.” *In re LCD
 26 (Dell)*, 781 F. Supp. 2d at 964.

27 The MPAs between Dell and Toshiba, Sharp and Hitachi stated that unit
 28 prices would be reviewed each month and that worldwide prices would be
 negotiated at Dell’s corporate headquarters in Austin, Texas. The

negotiated worldwide price applied to all TFT-LCD Products, wherever purchased, and was binding on Dell and its subsidiaries. *These allegations establish a concrete link between defendants' conduct, its domestic effect and Dell's foreign injury* that is far stronger than the tenuous arbitrage theory rejected in [other cases cited by Defendants].

Id. at 962 (internal citations omitted) (emphasis added). Judge Illston likewise rejected Defendants' attempt to limit recovery to purchases that ultimately made their way into the United States because such a result "would all but eviscerate the distinction between the 'domestic injury' exception and 'import commerce,' which is not subject to the FTAIA." See *In re TFT-LCD (Flat Panel) Antitrust Litig. (In re LCD (Motorola))*, 822 F. Supp. 2d 953, 963–64 (N.D. Cal. 2011).

All of Dell’s purchases are recoverable under the Clayton and Sherman Acts. Dell is seeking damages in connection with (1) CRT monitors that it purchased from Defendants or their co-conspirators in the United States, which constitute import commerce, and are exempt from the FTAIA, as well as (2) certain foreign purchases that are recoverable under the FTAIA’s domestic effects exception. Even if the jury found that certain of those purchases were not recoverable, Dell’s damages expert specifically segregated between United States and foreign purchases. *See* Ex. 2, Expert Report of Dr. Mohan Rao (Apr. 15, 2014) at ¶ 88 (“Rao Report”). Accordingly, Defendants’ motions for summary judgment as to the FTAIA should be denied as to Dell in their entirety.⁴

FACTUAL BACKGROUND

I. Dell Was a Major Purchaser of CRT Monitors from Defendants and Their Affiliates

Dell is a United States company based in Round Rock, Texas that develops and sells technology products, including, but not limited to, notebook and desktop computers. During the 1990s, CRT technology was widely used in computer monitors, and Dell was one of the largest, if not the largest, sellers of CRT monitors in North America. [REDACTED]

⁴ Dell is submitting a joint response to two other motions for summary judgment filed by Defendants on FTAIA grounds.

1

2

3 As a direct result of the Defendants' price-fixing conspiracy, Dell paid artificially
 4 inflated prices on more than \$5 billion in purchases of CRT monitors that contained price-
 5 fixed tubes Dell bought from Defendants or their affiliates.⁵ Dell is not seeking damages
 6 in connection with CRT monitors that it purchased from third parties. *Id.*

7 **II. The Conspirators Targeted United States Commerce**

8 As SDI admitted in its guilty plea, Defendants and their co-conspirators
 9 participated in a price-fixing conspiracy "among major CDT producers" from as early as
 10 March 1, 1995, through at least November 25, 2007 (the "Relevant Period"). Ex. 3, SDI
 11 Guilty Plea at ¶ 4(c). The purpose and effect of this anticompetitive conspiracy "was to fix
 12 prices, reduce output, and allocate market shares of CDTs sold in the United States and
 13 elsewhere."

14 There is overwhelming record evidence that the Defendants and their co-
 15 conspirators participated in multi-lateral and bi-lateral meetings in countries around the
 16 world, including the United States, and regularly communicated by phone, fax and email.
 17 Ex. 2, Rao Report at ¶ 18; Ex. 3, SDI Guilty Plea at ¶ 4(c). During these unlawful
 18 discussions and meetings, "agreements were reached to fix prices, reduce output, and
 19 allocate market shares of CDTs to be sold in the United States and elsewhere." Ex. 3, SDI
 20 Guilty Plea at ¶ 4(c).

21 As this Court has already noted, the "United States market was the most significant
 22 CRT and CRT Product market for most of the defendants in the case." *In re CRT*, Dkt.
 23 No. 2611 at 16. Accordingly, Defendants specifically targeted customers in the United
 24 States, including Dell. Indeed, the evidence, including Glass Meeting reports, "indicate[s]
 25

26

27

28

1 that the United States market was quite significant to the alleged co-conspirators,” and that
 2 meeting attendees “specifically discussed potential price and shipping charges directed
 3 toward the United States.” *In re CRT*, Dkt. No. 2611 at 16. For example, “[t]he alleged
 4 co-conspirators coordinated pricing decisions in relation to United States market
 5 conditions, and discussed CRT prices in U.S. dollars.” *In re CRT*, Dkt. No. 2437 at 15; [REDACTED]

6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]

SDI admitted that its “CDT sales, directly affected by the conspiracy, to customers
 in the United States totaled approximately \$89 million.” Ex. 3, SDI Guilty Plea at ¶ 4(c).
 When announcing the indictment of C.Y. Lin, the Acting Assistant Attorney General
 acknowledged that “[t]his conspiracy harmed countless Americans who purchased
 computers and televisions using cathode ray tubes sold at fixed prices.” *In re CRT*, Dkt.
 No. 665 (denying Defendants’ motion to dismiss on FTAIA grounds). In short, “[e]ven
 though much of the alleged conspiracy-related activity occurred abroad . . . the end target
 and end result was the United States.” *In re CRT*, Dkt. No. 2437 at 18; *see also id.*, Dkt.
 No. 2611 at 20 (same).

21 III. Dell’s Procurement Strategy

22 During most of the Relevant Period, Dell’s Worldwide Procurement Team was
 23 based in Round Rock, Texas, and was responsible for procuring CRT monitors for Dell.
 24 See Ex. 6, Deposition of Dell (30)(b)(6) representative Julie French (June 2, 2014)
 25 (“French 30(b)(6) Dep.”) at 38:8–39:1; Ex. 23, Dell’s Sept. 5, 2014 Responses to SDI
 26 Mexico First Set of Interrogatories at 8, 21–22 (“Dell’s Sept. 2014 Interrogatory
 27 Responses”); Declaration of Julie French in Support of Dell’s Opposition to Defendants’
 28

1 Motion for Summary Judgment With Respect to Dell's Foreign Purchases Under the
2 FTAIA ("French Decl.") at ¶ 4. [REDACTED]
3 [REDACTED]
4 [REDACTED] [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 Defendants knew that Dell negotiated prices on behalf of itself and its Foreign
10 Affiliates in Texas because they either (a) had MPAs with Dell that required worldwide
11 prices to be negotiated in Texas or (b) were owned or controlled by the CRT product
12 suppliers who had MPAs with Dell. [REDACTED]
13 [REDACTED] [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 The MPAs set forth the manner in which Dell and its suppliers negotiated CRT
19 product prices and made clear that those prices applied to every Dell affiliate and
20 subsidiary. See French Decl. at ¶ 18; Ex. 6, French 30(b)(6) Dep. at 282:5–284:14. The
21

22 _____
23 6 [REDACTED] [REDACTED]
24 [REDACTED]
25
26
27
28 [REDACTED] [REDACTED]

1 MPAs specifically required Dell's suppliers to negotiate worldwide CRT product prices
2 with Dell at its headquarters in Round Rock, Texas. See French Decl. at ¶ 19; Ex. 23,
3 Dell's Sept. 2014 Interrogatory Responses at 22; [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED] Accordingly, every Dell region paid the same inflated monitor price that
14 Defendants and their affiliates negotiated with Dell in Texas. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 ⁹ Dell has purchasing regions around the world, which are generally set up as foreign
affiliates of Dell.
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21
22 [REDACTED]
23
24
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28

1 Dell's Rule 30(b)(6) corporate representative, Julie French, testified that Dell
 2 centralized its procurement operations in Round Rock, Texas, rather than letting individual
 3 regions negotiate CRT prices, because [REDACTED]
 4 [REDACTED]
 5 [REDACTED] Ironically, Dell's
 6 suppliers exploited Dell's centralized procurement structure by setting a single, worldwide
 7 price to Dell in the United States that applied to all Dell purchases, thereby cheating Dell
 8 out of hundreds of millions of dollars.

9 **IV. The Conspirators Targeted Dell in the United States**

10 Notably, Dell is seeking to recover only for those overcharges it paid for CRT
 11 monitors that were purchased from Defendants or suppliers that owned or controlled the
 12 Defendant tube makers—Samsung, Philips, Hitachi and Mitsubishi. It was absolutely
 13 foreseeable that those companies would pass along CRT overcharges to Dell. [REDACTED]
 14 [REDACTED]
 15 [REDACTED] Indeed, Philips and Samsung had Strategic Alliance
 16 Agreements with Dell, which specifically recognized that [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
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7 [REDACTED]
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9 [REDACTED]
10 [REDACTED]
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18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 What is also clear from the conspiracy evidence is that Defendants specifically
5 targeted Dell, despite their contention that they were selling CRT monitors to Dell through
6 their affiliates. [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 Defendants also discussed Dell in the Glass Conspiracy Meetings. [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 As this Court reasoned in denying Philip's Motion to Dismiss on personal
11 jurisdiction grounds, "aiming anticompetitive acts toward the United States but rerouting
12 them through a related entity should not shield [Defendants] from what Plaintiffs have
13 sufficiently alleged to have been United States-directed price-fixing activity." *In re CRT*,
14 Dkt. No. 2611 at 17. The fact that Defendants sold CRT monitors to Dell through their
15 related entities and co-conspirators should not, and does not, shield Defendants from
16 liability under the FTAIA.

17 ARGUMENT AND CITATION OF AUTHORITIES

18 I. Legal Standard

19 As the Ninth Circuit recently held in *United States v. Hsiung*, an LCD case, "the
20 FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of
21 the federal courts." 758 F.3d 1074, 1088 (9th Cir. 2014) (quoting *Minn-Chem, Inc. v.*
22 *Agrium Inc.*, 683 F.3d 845, 852 (7th Cir. 2012)); *see also Animal Sci. Prods., Inc. v. China*
23 *Minmetals Corp.*, 654 F.3d 462, 469 (3d Cir. 2011). Accordingly, to prevail at the
24 summary judgment stage, movants must show "that there is no genuine dispute as to any
25 material fact and the movant[s] [are] entitled to judgment as a matter of law." Fed. R. Civ.
26 P. 56(a).

27

28

The movant has two summary judgment burdens: “A moving party without the ultimate burden of persuasion at trial—usually, but not always, a defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). This means that, “[i]n order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Id.* Ultimately, “the moving party must persuade the court that there is no genuine issue of material fact.” *Id.*

There is ample evidence in this case that, at a minimum, raises genuine disputes of fact as to the FTAIA’s application to Dell’s claims.

II. Defendants’ Motion Concedes that the Majority of Dell’s Purchases are Recoverable

Dell paid more than [REDACTED] in overcharges from the first quarter of 1997 through the first quarter of 2006 as a result of Defendants’ unlawful price-fixing conspiracy. Dell is seeking damages in connection with two distinct categories of purchases:

- Dell’s direct purchases of CRT monitors in the United States; and
- Dell’s Foreign Affiliates’ purchases of CRT monitors, which were based on prices that were negotiated with Dell in the United States, and contractually binding on Dell’s Foreign Affiliates pursuant to Dell’s MPAs.

Ex. 2, Rao Report at ¶ 88; Ex. 6, French 30(b)(6) Dep. at 177:15–178:11. Dell’s Foreign Affiliates have assigned their claims to Dell. Ex. 1 (Composite Exhibit of Dell’s Foreign Affiliates’ assignment of claims to Dell Inc.); Ex. 6, French 30(b)(6) Dep. at 177:15–178:1; Ex. 7, Dell’s June 2014 Interrogatory Responses at 6 (Response to Interrogatory No. 8).

1 In the Dell FTAIA Motion, Defendants do not dispute that Dell's United States
 2 purchases are recoverable under the FTAIA. Motion at 3 ("Removing these wholly-foreign
 3 purchases from Plaintiffs' claims will properly circumscribe those claims to the permissible
 4 scope of U.S. law."). Dell's United States purchases from the Defendants and their co-
 5 conspirators constitute import commerce, which is specifically exempt from the FTAIA.
 6 *See* 15 U.S.C. § 6a; *Hsiung*, 758 F.3d at 1086 ("[T]he FTAIA does not alter the Sherman
 7 Act's coverage of import trade; import trade is excluded from the FTAIA altogether.");¹²
 8 *see also* Plaintiffs' Joint Response to Defendants' Motions for Summary Judgment Based
 9 on the FTAIA.¹³

10 Defendants' FTAIA Motion against Dell is limited to the "CRT-Monitors that
 11 [Dell's] Foreign Affiliates purchased abroad, took control of abroad and resold abroad."
 12 Motion at 2. Contrary to Defendants' contention, however, the record evidence shows that
 13 Dell's Foreign Affiliates purchases were not "wholly foreign purchases." *Id.* They were
 14 based on (unlawful) prices that Dell negotiated with Defendants and their affiliates in the
 15

16 ¹² In *Hsiung*, the Ninth Circuit explained that fixing the price of a component that is
 17 subsequently imported into the United States by the manufacturer of a finished product
 18 constitutes "import trade" and falls outside the scope of the FTAIA. 758 F.3d at 1091 ("To
 19 suggest . . . that [the conspiring entity itself] was not an 'importer' misses the point. The
 20 panels were sold into the United States, falling squarely within the scope of the Sherman
 21 Act.").

22 ¹³ *See also Animal Sci. Products*, 654 F.3d at 470 (stating that it is "not a necessary
 23 prerequisite" that defendants themselves do the importing, but rather, the "relevant inquiry
 24 is whether . . . defendants' conduct target[ed] import goods or services"); *see also Fond du
 25 Lac Bumper Exchange, Inc. v. Jui Li Enterprises Co.*, 753 F. Supp. 2d 792, 795 (E.D. Wis.
 26 2010) (holding that "[d]efendants' alleged conduct involves import trade" both because
 27 "plaintiffs allege that a large percentage of defendants' [products] wind up in the United
 28 States" and because one defendant sells directly to "its American affiliate"). As Judge
 Illston reasoned in the LCD litigation, adoption of a test under "which only the first sale of
 a product could satisfy the standard would exclude from the Sherman Act's reach a
 significant amount of anticompetitive conduct that has real consequences for American
 consumers." *In re LCD (Motorola)*, 822 F. Supp. 2d at 964. She therefore declined to
 adopt such a test. As long as defendants knowingly fixed the price of goods that they
 knew would be imported, their conduct is actionable under the FTAIA, notwithstanding
 the foreign transactions that occurred prior to the goods' import. *See In re Vitamin C
 Antitrust Litig.*, 904 F. Supp. 2d 310, 318 (E.D.N.Y. 2012).

1 United States, and which were binding on Dell's Foreign Affiliates pursuant to Dell's
 2 MPAs. Significantly, Judge Illston considered virtually identical facts in the LCD antitrust
 3 case, and found that they were sufficient to establish that "that the MPAs and subsequent
 4 price negotiations were a domestic effect of defendants' anticompetitive conspiracy that
 5 proximately caused Dell's foreign injury" under the FTAIA. *In re LCD (Dell)*, 781 F.
 6 Supp. 2d at 964.

7 **III. Dell's Foreign Purchases Are Actionable Under the FTAIA's Domestic Effects
 8 Exception**

9 **A. The FTAIA Does Not Preclude Claims Based on Foreign Purchases**

10 Contrary to Defendants' cramped reading of the statute, the FTAIA does "not
 11 exclude all persons injured abroad from recovering under the antitrust laws of the United
 12 States." H.R. Rep. No. 97-686, at 10 ("Foreign purchasers should enjoy the protection of
 13 our antitrust laws in the domestic marketplace, just as our citizens do."). Rather, the
 14 FTAIA was enacted to preclude recovery for foreign injuries arising out of "conduct with
 15 no anticompetitive effects in the domestic marketplace." See H.R. Rep. No. 97-686, at 11;
 16 *Empagran*, 542 U.S. at 159. It is the defendants' conduct, not the plaintiffs' purchases,
 17 that determines whether the FTAIA applies. See 15 U.S.C. § 6a (the FTAIA shall not
 18 apply to "conduct involving trade or commerce") (emphasis added); *In re TFT-LCD (Flat
 19 Panel) Antitrust Litig. (In re LCD (TracFone))*, No. 10-cv-3205, 2014 WL 4652126, at *2
 20 (N.D. Cal. Sept. 18, 2014).

21 The FTAIA removes from the reach of the Sherman Act conduct involving trade or
 22 commerce with foreign nations (other than import trade or import commerce) but expressly
 23 allows a private plaintiff to bring a claim if such conduct: (1) has a "direct, substantial, and
 24 reasonably foreseeable effect" on American domestic or import commerce, and (2) such
 25 effect gives rise to a Sherman Act claim. 15 U.S.C. § 6a; *Empagran*, 542 U.S. at 161–62;
 26 *In re DRAM*, 546 F.3d at 985–86.

27 Provided that both prongs of the domestic effects test are satisfied, the Defendants'
 28 conduct is subject to United States antitrust laws. See FTAIA, 15 U.S.C. § 6a (placing

1 certain foreign conduct—not foreign damages—outside the scope of the Sherman Act).
 2 The location of the plaintiff’s purchases is irrelevant under the domestic effects test. *See*
 3 H.R. Rep. No. 97-686, at 12 (explaining that as long as the conduct has the requisite
 4 anticompetitive effects in the United States, there is no requirement “that the impact of the
 5 illegal conduct . . . be experienced by the injured party within the United States”).

6 Congress specifically considered the factual scenario presented in this case and
 7 expressed its intent that, if price-fixing conduct resulted in an “artificially inflated world-
 8 wide price that had the effect of raising domestic prices—the cartel’s conduct would fall
 9 within the reach of our antitrust laws.” H.R. Rep. No. 97-686, at 13. As the Supreme
 10 Court observed in rejecting the type of argument Defendants are making, “[t]o deny a
 11 foreign plaintiff injured by an antitrust violation the right to sue would . . . permit a price
 12 fixer or monopolist to escape full liability for his illegal actions and would deny
 13 compensation to certain of his victims, merely because he happens to deal with foreign
 14 customers.” *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 314–15 (1978); *see also*
 15 H.R. Rep. No. 97-686, at 10 (quoting *Pfizer*).¹⁴

16 **B. Defendants’ Conduct Had a “Direct, Substantial, and Reasonably
 17 Foreseeable Effect” on United States Commerce**

18 Defendants’ conduct indisputably had a “direct, substantial, and reasonably
 19 foreseeable effect” on United States commerce.¹⁵ It “harmed countless Americans who
 20

21 ¹⁴ The House Report notes that “[a]s the Supreme Court pointed out in *Pfizer*, to deny
 22 foreigners a recovery could under some circumstances so limit the deterrent effect of
 23 United States antitrust law that defendants would continue to violate our laws, willingly
 24 risking the smaller amount of damages payable only to injured domestic persons.” H.R.
 25 Rep. No. 97-686, at 10.

26 ¹⁵ The Ninth Circuit has held that, “an effect is ‘direct’ if it follows as an immediate
 27 consequence of the defendant’s activity.” *United States v. LSL Biotechnologies*, 379 F.3d
 28 672, 680 (9th Cir. 2004); *see also Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d
 395, 413 (2d Cir. 2014) (“There is nothing inherent in the nature of outsourcing or
 international supply chains that . . . renders any and all domestic effects impermissibly
 remote or indirect. Indeed, given the important role that American firms and consumers
 play in the global economy, we expect that some perpetrators will design foreign
 anticompetitive schemes for the very purpose of causing harmful downstream effects in the
 United States.”).

1 purchased computers and televisions using cathode ray tubes at fixed prices.” *In re CRT*,
 2 Dkt. No. 665 (denying Defendants’ motion to dismiss on FTAIA grounds). SDI admitted
 3 that its “CDT sales, directly affected by the conspiracy, to customers in the United States
 4 totaled approximately \$89 million.” Ex. 3, SDI Guilty Plea at ¶ 4(c). “Even though much
 5 of the alleged conspiracy-related activity occurred abroad [in this case] . . . the end target
 6 and end result was the United States.” *In re CRT*, Dkt. No. 2437 at 18; *see also id.*, Dkt.
 7 No. 2611 at 20.¹⁶ For purposes of the domestic effects test, “[t]he geographic target of the
 8 alleged anticompetitive conduct matters greatly.” *Turicentro, S.A. v. Am. Airlines Inc.*, 303
 9 F.3d 293, 305 (3d Cir. 2002), *overruled, in part, on other grounds by Animal Sci. Prods. v.*
 10 *China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011).

11 The domestic effects of Defendants’ conduct on United States commerce were also
 12 reasonably foreseeable. As this Court previously observed, “the United States market was
 13 the most significant CRT and CRT Product market for most of the defendants in the case.”
 14 *In re CRT*, Dkt. No. 2611 at 16. During Glass Meetings, Defendants “specifically
 15 discussed potential price and shipping charges directed toward the United States.” *Id.*; *In*
 16 *re CRT*, Dkt. No. 2437 at 15 (“The alleged co-conspirators coordinated pricing decisions in
 17 relation to United States market conditions, and discussed CRT prices in U.S. dollars.”).

18 Defendants’ conduct also had a “direct, substantial, and reasonably foreseeable
 19 effect” on Dell, regardless of whether Defendants sold CRTs directly to Dell, or sold CRT
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21¹⁶ See *Costco Wholesale Corp. v. AU Optronics Corp.*, No. 13-cv-1207, 2014 WL
 22 4718358, at *2 n.2 (W.D. Wash. Sept. 22, 2014) (“[T]he Sherman Act applies to foreign
 23 conduct that was meant to produce and did in fact produce some substantial effect in the
 24 United States.”) (quoting *Hartford Fire Ins. Co. v. Calif.*, 509 U.S. 764, 796 (1993));
Minn-Chem, Inc., 683 F.3d at 858 (noting “the well-established principle that the U.S.
 25 antitrust laws reach foreign conduct that harms U.S. commerce”); *In re Automotive Parts*
Antitrust Litig., No. 2:12-cv-00500, 2014 WL 4209588, at *7 (E.D. Mich. Aug. 26, 2014)
 26 (“The conduct at issue in this case is not the type of conduct Congress sought to exclude
 27 from the Sherman Act’s reach.”); *Fond du Lac*, 795 F. Supp. 2d at 850 (conduct involved
 28 both import commerce and foreign commerce and was not the type of activity that
 Congress intended to exclude from the reach of the Sherman Act); *In re Vitamin C*
Antitrust Litig., 904 F. Supp. 2d at 317 (“defendants’ conduct was directed at the U.S.
 import market”).

1 monitors through their affiliates. *See Costco Wholesale Corp. v. AU Optronics Corp.*, No.
 2 13-cv-1207, 2014 WL 4718358, at *6 (W.D. Wash. Sept. 22, 2014) (“Defendants sold
 3 many of their price-fixed panels to their own subsidiaries, which is an odd choice if they
 4 did not believe they would eventually profit from increased finished product profits at
 5 those subsidiaries. This suggests that increased finished product prices were not only
 6 ‘reasonably foreseeable,’ they were actually foreseen.”). Indeed, the evidence shows that
 7 Defendants specifically targeted Dell.¹⁷ Pursuant to Dell’s MPAs, Dell’s Worldwide
 8 Procurement Team entered into pricing agreements with its CRT product suppliers in
 9 Texas, under which both Dell and its Foreign Affiliates were obligated to purchase CRT
 10 monitors at prices that included substantial overcharges. French Decl. at ¶ 5; Ex. 8, Philips
 11 MPA; Ex. 9, Samsung MPA; Ex. 23, Dell’s Sept. 2014 Interrogatory Responses at 21.¹⁸

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24¹⁸ Dell is only seeking damages in connection with CRT monitors it bought from suppliers
 25 that owned or controlled the Defendant tube makers. For conspiracy purposes, courts
 26 disregard the legal distinction between parents and their wholly-owned subsidiaries. These
 27 entities are viewed as a single economic unit. *See Copperweld Corp. v. Independence*
Tube Corp., 467 U.S. 752, 771 (1984) (“the coordinated activity of a parent and its wholly
 28 owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the
 Sherman Act They are not unlike a multiple team of horses drawing a vehicle under
 the control of a single driver.”).

1 Defendants ignore this domestic effect, and argue that the “alleged overcharges on
 2 Plaintiffs’ foreign purchases do not implicate any effect on U.S. commerce.” Dell FTAIA
 3 Motion at 7. However, ***the setting of an unlawful price in the United States is a domestic***
 4 ***effect under the FTAIA.*** *In re LCD (Dell)*, 781 F. Supp. 2d at 964 (finding that
 5 allegations that setting of a worldwide price in the United States was a domestic effect).
 6 Courts do not “draw a distinction between the setting of and the payment of higher prices
 7 and it would be inconsistent with prior decisions to find that the ‘domestic effect’ language
 8 of the FTAIA requires more—*i.e.*, that it requires actual payment of those prices.” *Sun*
 9 *Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1112 (N.D. Cal.
 10 2007); *see id.* at 1113 (rejecting argument that “domestic effect” had to be the actual
 11 payment of higher prices in the United States and holding that “a domestic effect is
 12 established here by virtue of plaintiffs’ allegations that defendants’ conduct led to higher
 13 prices for DRAM in the United States, which in turn formed the predicate for plaintiffs’
 14 domestic agreements to pay higher prices for DRAM”); *In re Dynamic Random Access*
 15 *Memory (DRAM) Antitrust Litig.*, No. 02-cv-1486, 2006 WL 515629, at *3 (N.D. Cal.
 16 Mar. 1, 2006), *aff’d*, 546 F.3d 981 (9th Cir. 2008).¹⁹

17 Just as in LCD, by setting unlawful CRT product prices to Dell in the United
 18 States, which were contractually binding on Dell’s foreign subsidiaries and affiliates,
 19 Defendants’ price-fixing conspiracy had a direct, substantial and reasonably foreseeable
 20 domestic effect on Dell. *See In re LCD (Motorola)*, 822 F. Supp. 2d at 966 (“The
 21 increased price of the components caused the prices of the finished products in the United
 22 States to increase. If this effect is not ‘direct,’ it is difficult to imagine what would be.”).

23

24 ¹⁹ Defendants do not cite a single case that holds that payment of higher prices, rather than
 25 the existence or setting of such prices, is the required domestic effect of foreign price-
 26 fixing conduct. Indeed, in *Empagran*, the Supreme Court referred to “higher prices in the
 27 United States,” not payment of those higher prices, as an example of an adverse domestic
 28 effect. Likewise, on remand, the D.C. Circuit acknowledged that “maintaining super-
 competitive prices in the United States,” not payment of those higher prices, was the
 domestic effect at issue; however, Prong 2 of the domestic effects test was not met. *See*
Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 417 F.3d 1269, 1270-71 (D.C. Cir. 2005).

1 **C. The Domestic Effects of Defendants' Conduct Gave Rise to Dell's**
 2 **Foreign Affiliates' Injuries**

3 The domestic effect of Defendants' conduct, the setting of an artificially inflated
 4 CRT monitor price to Dell in the United States, is precisely what "gave rise to" Dell's
 5 Foreign Affiliates' injuries. The "gives rise to" prong of the domestic effects exception
 6 requires a plaintiff to show a sufficient causal nexus between the domestic effect and the
 7 injury that plaintiff suffered abroad. *See In re DRAM*, 546 F.3d at 985–86.

8 Here, Dell negotiated a global inflated price with Defendants in the United States
 9 that was binding on Dell's Foreign Affiliates by virtue of Dell's MPAs. [REDACTED]

10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]

18 These inflated U.S.-negotiated prices, which were binding on Dell's Foreign
 19 Affiliates, establish "a concrete link" between Defendants' conduct, its domestic effect,
 20 and the claims of Dell's Foreign Affiliates, which were assigned to Dell. *See In re LCD*
 21 (Dell), 781 F. Supp. 2d at 963–64 (finding that allegations that Dell negotiated a
 22 worldwide price in Texas that was binding on Dell and its Foreign Affiliates were
 23 sufficient to satisfy the FTAIA's domestic effects test).²⁰

24 ²⁰ Although the Seventh Circuit recently concluded that Motorola's procurement structure
 25 did not satisfy the FTAIA's domestic effects test in *Motorola Mobility LLC v. AU*
Optronics Corp., that court's ruling is not binding on this Court, is currently subject to a
 26 petition for rehearing en banc, and, in any event, is distinguishable. No. 14-8003, 2014
 27 WL 6678622 (7th Cir. Nov. 26, 2014) (petition for rehearing en banc filed by Motorola on
 28 December 17, 2014, No. 14-8003, Dkt. Nos. 139 and 141). First, Motorola argued that
 when its foreign subsidiaries made purchases at prices set by Motorola in the United States
 that "Motorola was the real buyer of the panels and so the panels were really *imported*

1 Defendants knew their conduct, and the domestic effects of their conduct, would
 2 result in injury to Dell worldwide. *See Minn-Chem*, 683 F.3d at 860–61 (holding that
 3 where “foreign sellers allegedly created a cartel, took steps outside the United States to
 4 drive the price up of a product that is wanted in the United States, and then (after
 5 succeeding in doing so) sold that product to U.S. customers . . . [t]he payment of
 6 overcharges by those customers was objectively foreseeable” and therefore not barred by
 7 the FTAIA). Indeed, in order to overcharge Dell’s Foreign Affiliates, Defendants and their
 8 monitor maker affiliates necessarily had to set an unlawful worldwide price to Dell in
 9 Texas. [REDACTED]

10 [REDACTED] See Ex. 2, Rao Report at ¶ 43
 11 (citing European Commission finding that “the companies were well aware that they were
 12 breaking the law” and translation of the Korean Fair Trade Commission Multi-Party
 13 Meeting Decision No. 2011-019 at 22 (March 10, 2011)). Thus, it would not be unfair to
 14 subject Defendants to liability for sales to Dell’s Foreign Affiliates under United States
 15 antitrust laws.

16 In any event, whether the “gave rise to” prong of the domestic effects exception is
 17 satisfied raises questions of fact that should be decided by the jury. *See, e.g., In re TFT-*
18 LCD (Flat Panel) Antitrust Litig., MDL No. 1827, 2012 WL 4513866, at *1 (N.D. Cal.
 19 Oct. 1, 2012) (FTAIA’s “giving rise” prong presents issues of fact to be resolved by the
 20 jury). Because there is evidence from which a jury could find that the domestic effect of
 21 Defendants’ conduct (setting an inflated CRT monitor price to Dell in the United States)
 22

23 directly into the United States. . . .” *Id.* at *6 (emphasis added). Dell does not contend that
 24 the purchases at issue in the present Motion constitute import commerce. Second, the
 25 Seventh Circuit’s decision was premised, in large part, on *Illinois Brick* and standing
 26 considerations. *Id.* (“Motorola’s foreign subsidiaries, the direct purchasers from the
 27 makers of the panels, are legally distinct foreign entities and ***Motorola cannot impute to***
itself the harm suffered by them.”) (emphasis added). Dell does not seek to “impute” to
 28 itself the harm of its Foreign Affiliates. Dell’s Foreign Affiliates have Sherman Act claims
 under the FTAIA’s domestic effects exception, and explicitly assigned their claims to Dell.
Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 437 (3d Cir.
 1993) (“There is no serious doubt that an antitrust claim can be expressly assigned.”).

1 proximately caused Dell's foreign injuries (payment of higher prices abroad), summary
2 judgment should be denied.

3 **CONCLUSION**
4

5 For the reasons set forth above, Defendants' motions to bar Dell's claims under the
6 FTAIA should be denied in their entirety.
7

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9

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